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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 522

MICHAEL JOSEPH LYNCH, *Petitioner*

v.

LEWIS B. HERSHEY, *Director, Selective Service.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Carl L. Shipley, on behalf of Michael Joseph Lynch, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled case on December 3, 1953.

Opinion Below.

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at page 5 of the Joint Appendix.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 USCA 1254.

Questions Presented.

1. Whether a petition for a writ of habeas corpus filed by a selective service registrant alleging facts indicating that his induction order was invalid because it was issued in violation of his statutory and regulatory rights as set forth in 32 CFR 1602, et seq. and 50 USCA App. 451, et seq., 62 Stat. 604, and alleging that he is in *constructive custody* by reason of threatened criminal prosecution for failure to obey said invalid order, thereby raising genuine and material issues of fact and law, was properly denied by the trial court?

2. Whether the court below erred and denied petitioner due process of law in holding that a writ of habeas corpus need only issue in circumstances related to *actual confinement?*

3. Whether refusal by the Court below to apply the principle of *constructive custody* deprived petitioner of the privileges and immunities guaranteed by Article IV, Sec. 2 and Art. I, Sec. 9 of the Constitution?

4. Whether the refusal to issue a writ of habeas corpus and consequent denial of opportunity to petitioner to prove by evidence at a hearing in open court the fact of *restraint* denied to him due process of law?

5. Whether the decision of the Court below unconstitutionally deprives petitioner of his statutory right (Title 16-801 D. C. Code, 1951, 31 Stat. 1372, ch. 854, par. 1143, Act of March 3, 1901) to an issuance of a writ of habeas corpus upon a *prima facie* showing of *restraint,* as distinguished from *detention?*

6. Whether Title 16-801, D. C. Code 1951 unconstitutionally deprives petitioner of the privilege of the writ of habeas corpus as guaranteed in Art. 1, sec. 9 of the Constitution?

Statutes Involved.

Title 16-801, D. C. Code 1951:

> "Any person committed, detained, confined, or *restrained* from his lawful liberty within the District, under any *color or pretense whatever*, or any person in his or her behalf, may apply by petition to the District Court of the United States for the District of Columbia, or any justice thereof, for a writ of habeas corpus, to the end that the course of such commitment, detainer, confinement or restraint may be inquired into; and the court or justice applied to, *if the facts set forth in the petition make a prima facie case, shall forthwith grant such writ*, directed to the officer or other person in whose *custody* or *keeping* the party so detained shall be, returnable forthwith before said court or justice." (Emphasis supplied.)

Constitutional provisions involved:

Art. I, Sec. 9, U. S. Const.

> "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

Art. IV, Sec. 2, U. S. Const.:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

Statement

In 1948 petitioner, a then resident of California, was classified 4-F, because of the loss of a finger, by Local Board 93, Alahambra, California. Subsequent to 1948 petitioner completed college in California and Switzerland, all the while classified 4-F, then moved to Dell City, Texas and entered the business of farming by becoming a 15% owner in a 62,000 acre venture.

In October, 1952 Local Board 93 of Alahambra, California reclassified petitioner 1-A without notice, leaving no

opportunity for oral presentation of evidence, despite the fact he was and had been a resident of Texas for more than a year, and despite the fact that he was an irreplaceable agricultural employee entitled to deferment under 32 CFR 1622.24 and 50 USCA App. 451, et seq. Petitioner's request to have his draft board changed from California to Texas where the question of his agricultural irreplaceability could be properly determined by a draft board familiar with the agricultural situation in Texas was ignored, as was his request for reconsideration and an opportunity to present more evidence.

The California draft board caused petitioner to be ordered to report for induction at El Paso, Texas on April 17, 1953, upon pain of fine and imprisonment if he failed to comply, as set forth in a form notice issued by the Director of Selective Service.

Prior to that date petitioner came to Washington to seek relief from defendant. He had no other recourse in that he had been reclassified and ordered inducted by an urban California board and denied an opportunity to be classified by the board in Texas, where he lived and carried on his business. Thus he appealed to defendant who denied him his statutory and regulatory rights. Whereupon petitioner set forth the above allegations of fact in a petition for a writ of habeas corpus in the U. S. District Court for the District of Columbia. That court refused to issue a writ with the result that petitioner was deprived of an opportunity to test the validity of his induction order.

Petitioner appealed to the U. S. Court of Appeals for the District of Columbia Circuit, which affirmed the action of the District Court, stating " * * * we deem it unwise to dilute the potency of the great writ (habeas corpus) by sanctioning its use in circumstances not related to *actual confinement.*"

Argument

1. The decision of the Court below turns upon its conclusion that petitioner was not entitled to the writ because he was not in "actual confinement," (*infra*, p. 5). Petitioner contends this is an erroneous statement of the law. Title 16-801, D.C. Code 1951, *infra* p. 3, under which petitioner asserted his right to a writ of habeas corpus provides that the writ *shall* issue to not only persons *committed, detained, confined,* i.e. those in "actual confinement," but to those *restrained* as well. Congress had a purpose in using words other than *committed, detained,* and *confined,* and that purpose was to afford those in *constructive custody,* as distinguished from *actual custody,* access to the writ. This interpretation is borne out by the fact that Title 16-801 D.C. Code 1951 also refers to "keeping", as well as "custody, indicating that *constructive custody* is included in the term *restraint* as used in the statute. It may well be that persons who petition for a writ of habeas corpus under 28 USCA 2241 must be in "actual" custody to qualify for the writ, since that statute uses only the single word *custody* to describe the kind and quality of detention necessary to justify issuance of the writ. Petitioner herein relies on Title 16-801 D.C. Code 1951, and not 28 USCA 2241; as a basis for his right to have the writ issue. The court below erred in applying the standards of 22 USCA 2241 to an application for a writ brought under the more liberal statute in force in the District of Columbia.

2. The decision of the court below is in direct conflict with the decisions of federal courts in other districts. Thus, Judge McGranery, later Attorney General of the United States, determined the law to be exactly the opposite in a selective service case on all fours with the case at bar, and the Government did not appeal the case. See *Ex Parte Fabiani,* 105 F. Supp. 139, 148 (E.D. Pa. 1952) where the court held:

> "The Court is of the opinion that the petitioner is presently in the constructive custody of the Govern-

> ment by reason of the United States Attorney's direction to him to return to the United States by February 15 or be indicted. He is not free to go where he pleases; in a sense, he is enjoying jail liberties. This type of detention was held sufficient to support the issuance of a writ of habeas corpus in *Chin Chow* v. *U. S.*, 208 U. S. 8, 28 S. Ct. 201, 52 L. Ed. 369 * * *. A writ of habeas corpus will issue. Nevertheless, since the interest of this Court is to see substantial justice done in this case, and since, in the well remembered rhetorical image of Professor Maitland, the forms of action, though dead, must not rule us from their graves, an injunction also will issue against the United States Attorney's Office and the local board to protect the rights of the petitioner pending (1) appeal or (2) a composition between the petitioner and the board or (3) further order of this Court."

In that case the threat of criminal prosecution for failure to report in response to an invalid induction order was *constructive custody* sufficient to support a petition for a writ of habeas corpus. That being the law under 22 USCA 2241, the *Fabiani* rule must *a fortiori* apply under the more liberal District of Columbia statute.

3. The court below has itself recognized the principle of *constructive custody* in citizenship cases. Thus in *Mendellsohn* v. *Dulles*, — App. D.C. —, 207 F. 2d 37, it held that the "duress of devotion" constitutes restraint:

> "* * * the coercion of marital affection * * * was just as compelling as *physical restraint.*" (Emphasis supplied.)

The Supreme Court of the U. S. has recognized that *constructive custody* arises when a citizen is denied entry into the country and denied "a fair opportunity to produce the evidence" that he was born in the U. S., and that a writ of habeas corpus should issue to provide a forum for a hearing in such cases. *Chin Chow* v. *U. S.*, 208 U. S. 8, 28 S. Ct. 201, 52 L. ed. 369. Surely the civil rights to be protected

under the Universal Military Training and Service Act are as important as those protected under the Chinese exclusion acts.

4. Habeas corpus has long been regarded as a proceeding in which a liberal judicial attitude is peculiarly appropriate in view of the broadly remedial nature of the writ. *Stewart* v. *Overholser,* 87 U. S. App. D. C. 402, 405, 186 F. 2d 339 (1950); *Mercado* v. *U. S.,* 183 F. 2d 486, 487 (CCA 1). Certainly the conflict between the law established in *Fabiani, supra,* and by the court below should be resolved in accordance with the rule of construction set forth in the *Stewart* case, *supra.*

5. If the terms "restraint" and "keeping" as used by Congress in Title 16-801 D. C. Code 1951, *infra* p. 3, do not contemplate *constructive custody* as well as *actual confinement,* then that statute is unconstitutional in that it partially suspends the right to a writ of *habeas corpus* in violation of Art. I, Sec. 9 of the Constitution, *infra* p. 3. To the extent the court below denies that a person in *constructive custody* is entitled to the writ, it also suspends petitioner's constitutional right to habeas corpus. See *Re Bonner,* 151 U. S. 242, 259, 38 L. ed. 149 (1894), Field, J. "To deny the writ of habeas corpus * * * is a virtual suspension of it." There is nothing in the Constitution to indicate that the privilege of the writ is limited to persons in *actual confinement.* This Court itself has suggested the contrary in stating that "present means of enforcing" confinement constitutes custody for habeas corpus purposes, and that "the extent and character of the restraint which justifies the writ must vary according to the nature of the control that is asserted." See *Wales* v. *Whitney,* 114 U. S. 564, 571, 5 S. Ct. 1050, 29 L. ed. 277. Other federal courts, including the court below, have long recognized that mere induction into the military forces without any other restraint, physical or otherwise, gives rise to a right to test the induction order via *habeas corpus. U. S. ex rel. Levy*

v. *Cain,* 149 F. 2d 338 (CCA 2). See also *Smith* v. *U. S.,* 148 F. 2d 288 (CCA 4), rev'd on other grounds 327 U. S. 114. As stated in a typical case, "The inductee may, of course, apply for habeas corpus as soon as his induction into the Army is completed, and need not wait until he is court-martialed for disobedience of military orders." *Gibson* v. *U. S.,* 149 F. 2d 753 (CCA 8), and cases cited. Certainly there is no more "actual confinement" after induction than while under orders to report for induction. In each case the "restraint" consists of the "means of enforcing confinement" through court-martial or criminal procedures. These cases clearly establish a right to a writ of habeas corpus while in *constructive custody.*

In *Estep* v. *U. S.,* 327 U. S. 114, 123, 90 L. ed. 567, 574, this Court has intimated that habeas corpus is available prior to induction:

> "It has been assumed that habeas corpus is available *only* after a registrant has been inducted into the armed services. But if we now hold that a registrant could not defend at his trial on the ground that the local board had no jurisdiction in the premises, it would seem that the way would then be open to him to challenge the jurisdiction of the local board after conviction by habeas corpus. The court would then be sending men to jail today when it was apparent they would have to be released tomorrow." (Emphasis supplied)

Why is it any wiser to induct a man into the army today when it is apparent he will have to be discharged tomorrow? At the moment of receipt of an induction order the time is ripe for review of a registrant's draft classification by *habeas corpus* proceedings.

6. By restricting habeas corpus proceedings to actual confinement, the court below has denied petitioner an opportunity "to claim the benefit of the writ of habeas corpus," in violation of Art. IV, Sec. 2 of the Constitution. *Corfield* v. *Coryell,* 4 Wash. (U. S.) 371, 380 (1823).

7. Petitioner is at present under a continuing order to report for induction, in response to an invalid induction order, or be indicted. As stated in the *Fabiani* case, *supra*, "He is not free to go where he pleases; in a sense, he is enjoying jail liberties." Under the law in the Eastern District of Pennsylvania, petitioner would qualify for habeas corpus at the present time. *Ex Parte Fabiani*, 105 F. Supp. 139, 143. Under the law as decided by the court below, petitioner cannot avail himself of the writ of habeas corpus. Petitioner cannot obtain equal justice under the law in the District of Columbia. His civil rights are determined by chance, depending on where he applies for a writ of habeas corpus. It is submitted that the court below is wrong and the rule of the *Fabiani* case is the correct statement of the law. There Judge McGranery said:

> "We are met at the outset of our consideration of the legal issues herein with the question whether this Court has the power, at this point in time, to review the action of the local board at all, or whether petitioner must first report for induction and then adopt one of two courses: (1) refuse to submit to induction and in the criminal prosecution which would surely follow, defend on the ground that the board's action was without basis in fact or contrary to Selective Service Regulations; or (2) allow himself to be inducted and then sue for a writ of habeas corpus.
>
> The Court is of the opinion that the petitioner is not driven to choose one of two such desperate alternatives; that it may intervene at this juncture to protect his rights." 105 F. Supp. 139, 143.

The above statement of the law, taken along with the previously cited decisions of federal courts indicating that the principle of *constructive custody* is constantly applied in selective service cases, and reviewed in the light of the special statute in force in the District of Columbia, can but lead to the conclusion that the decision of the court below in limiting *habeas corpus* in selective service cases to persons in "actual confinement" is clearly erroneous, and in

conflict with the general body of federal law. Unless this Court grants petitioner a writ of certiorari, he will be denied substantial rights and left with no adequate remedy at law or in equity, and similarly situated selective service registrants will be deprived of their constitutional right of the privilege of habeas corpus.

Conclusion

The decision of the court below is clearly wrong, there is a direct conflict of decisions, and further review by this Court is inexorably called for. It is respectfully submitted that this petition for a writ of certiorari should be granted.

It is further requested that any proceedings by the U. S. Attorney for the District of Columbia and/or the U. S. Commissioner for the District of Columbia as to petitioner be stayed pending decision on this petition.

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v.

LEWIS B. HERSHEY, DIRECTOR OF SELECTIVE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 5-6) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 3, 1953 (R. 7). The petition for a writ of certiorari was filed on January 6, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a draft registrant who had not as yet been arrested or indicted for failure to report for

induction could attack the validity of his classification by a petition for a writ of habeas corpus to the Director of Selective Service.

STATEMENT

Petitioner filed in the United States District Court for the District of Columbia a petition for a writ of habeas corpus, the substance of which is as follows (R. 2-3):

Petitioner is a resident of Dell City, Texas, where he is a 15% partner in a 62,000 acre farming venture. In 1948, because of the loss of a finger, he was classified 4-F by Local Board 93, Alhambra, California, while a student at the University of Southern California. When he entered the farming business in Texas in 1951 he was still classified 4-F. In October 1952 he was reclassified 1-A, and refused to report for induction into the armed services at El Paso, Texas, as ordered on April 17, 1953. Four days later, after voluntarily taking up residence at the Statler Hotel in Washington, D. C., he filed the habeas corpus petition in which he alleged that he was restrained of his liberty by respondent, Lewis B. Hershey, Director of Selective Service at Washington, D. C. He alleged that this restraint consisted of a threat of fine and imprisonment, after refusal to grant him a personal appearance before the California board, the right to have his appeal for agricultural deferment decided by an appeal board in Texas, the right to have his classification reconsidered to avoid injustice, and the right to be classified II-C as an agricultural employee, in ac-

cordance with certain designated selective service regulations.

After oral argument, the district judge denied the petition (R. 4). On appeal the judgment was unanimously affirmed (R. 7). The court below rejected as untenable petitioner's contention that the threat of imminent criminal prosecution for failure to report in response to the induction order constituted sufficient "constructive custody" to warrant issuance of the writ and pointed out that the instant case was not essentially different from any other where prosecution is threatened for failure to obey a lawful statute (R. 5-6).

ARGUMENT

The petition for habeas corpus was properly dismissed since it did not allege any physical restraint of petitioner. *McNally* v. *Hill,* 293 U. S. 131, 138; *Stallings* v. *Splain,* 253 U. S. 339, 343; *Wales* v. *Whitney,* 114 U. S. 564, 571-572. The allegation that petitioner's restraint consisted of a threat of fine and imprisonment by respondent, was manifestly insufficient. See *Biron* v. *Collins,* 145 F. 2d 758, 759 (C. A. 5), where the court said:

> [The registrant] has never been arrested, he is physically free to come and go, the members of the Local Board have no authority to imprison him and have not attempted to do so. He is not in their custody, nor can they in any lawful manner seize and produce his body in answer to the writ. All they have done or can do is to issue an order to him in the line of their

> duty. *It is true that if he disobeys, the law threatens punishment. The law constantly threatens imprisonment to anyone who does not obey its commands, but one is not for that reason entitled to examine the validity of the law by writ of habeas corpus.* [Emphasis added.]

In fact, petitioner did not allege any kind of restraint by respondent Director of Selective Service which would enable respondent to produce the body of petitioner in court in response to a writ. Petitioner's failure to report for induction made him a "delinquent" under the selective service regulations,[1] which require that "Every registrant who fails to comply with an Order to Report for Induction * * * shall be reported promptly to the United States Attorney * * *," [2] and "In no event shall the local board order or participate in the arrest of a delinquent." [3] Under the regulations, respondent is prevented from ordering or participating in the arrest of petitioner as a delinquent, that being the function of the United States Attorney. There is no allegation that the United States Attorney for the District of Columbia, the so-called place of confinement, has ordered any prosecution of petitioner.

Petitioner is of his own free will living in a hotel

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[1] 32 C.F.R. 1602.4 (1951 ed.) provides: "A 'delinquent' is a person required to be registered under the selective service law who fails or neglects to perform any duty required of him under the provisions of the selective service law."

[2] 32 C.F.R. § 1642.41 (a) (1951 Ed.).

[3] 32 C.F.R. § 1642.41 (b) (1951 Ed.).

of his choice far from his present residence and from the place of classification. Manifestly, this is not confinement by respondent.[4]

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1954.

[4] The allegations of the habeas corpus petition did not bring it within Title 16-801, D.C. Code (1951 Ed.) as petitioner contends (See Pet. 5). There were no factual allegations sufficiently showing restraint of petitioner's liberty, or that petitioner was ever in the "custody" or "keeping" of respondent.

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